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In the Supreme Court of the United States

October Term, 1975

NO. 75-128

MARTIN MILLER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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The Petitioner, MARTIN MILLER, prays that a Writ of Certiorari issue to review the judgment and opinion entered on June 24th, 1975, by the United States Court of Appeals for the Second Circuit in a proceeding entitled *United States of America, Plaintiff-Appellee, against Bertram L. Podell and Martin Miller, Defendants-Appellants,* Docket No. 75-1019.

Opinion Below

The judgment and opinion of the Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at page 1a, of the Petition of Martin Miller.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on June 24th, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

Whether the Circuit Court of Appeals erred in not applying the *Santobello* rule where the Government was found to have breached a promise concerning sentence recommendation?

Whether the Circuit Court of Appeals erred in not applying the *McCarthy* rule where the Petitioner's plea of guilty did not conform to the requirements of Rule 11 of the Federal Rules of Criminal Procedure?

Statutory Provisions Involved

Rule 32(d) of the Federal Rules of Criminal Procedure states as follows:

> "(d) Withdrawal of Plea of Guilty. A Motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest in-

justice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Rule 11 of the Federal Rules of Criminal Procedure states as follows:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Statement of the Case

On his plea of guilty, Petitioner MARTIN MILLER, was convicted in the United States District Court for the Southern District of New York of conspiracy to violate the Federal Conflict of Interest Statute, Title 18, United States Code, Section 203, in violation of Title 18, United States Code, Section 371. The indictment in the case arose out of Podell's appearance before various Federal agencies, while a member of the House of Representatives, on behalf of Florida-Atlantic Airlines, a now defunct corporation which was owned by Petitioner, MARTIN MILLER. The theory of the Government's case was that Podell was

compensated for these appearances by fees paid to Podell's law firm by Florida Atlantic Airlines and by a political contribution for Podell's re-election campaign paid directly by MARTIN MILLER.

Prior to sentence, Petitioner moved in the District Court pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure for an order allowing him to withdraw his plea of guilty. This motion was grounded upon an allegation that certain essential promises made by the Government during plea negotiations had been breached, when, on the eve of sentence, a Government attorney recommended that Miller be sentenced to jail.[1]

The Petitioner's motion alleged that:

> "Insofar as representations and promises made to the defendant, Martin Miller, are concerned, both your deponent and Mr. Miller were told on a number of occasions by Mr. Giuliani and by Mr. Jaffe that it was the position of the United States Attorney's office not to recommend a specific sentence. Both further stated on numerous occasions that they would recommend to the Court neither a suspended sentence nor, on the contrary would they recommend that the defendant receive a specific jail sentence." (A 62-63)[2]

In response to Petitioner's claim in the District Court, the Government asserted that the letter in question was not a recommendation that Miller be sentenced to jail. (A 78-79) The Trial Court dismissed this argument out-of-hand and stated that:

---

[1]This letter appears in the Circuit Court's opinion on page 4369-70.

[2]The letter "A" refers to Petitioners' joint Appendix on file in the United States Court of Appeals for the Second Circuit.

"I think the letter is a recommendation for a jail sentence and I think if you did make such a promise, the question is whether or not only that you violated it, but what effect that had." (A 79)

After testimony taken at an evidentiary hearing, the Court made a finding of fact that the Government had indeed made a representation to Miller and that the letter was "in essence . . . a violation of the spirit, if not the letter of agreement" (A 180); however, the District Court concluded that "once Mr. Podell pleaded guilty, Mr. Miller had nothing else to do, so he had no choice, once Podell pleaded." (A 181)

In affirming the District Court, the Circuit Court held:

"The district court's finding that Miller pleaded guilty because Podell had done so, and not because of prosecution promises, is also not clearly erroneous. Miller was charged with conspiring with Podell and with making illegal payments to him. Once Podell pleaded guilty to accepting those payments, the Government could have called him as a most effective witness against Miller. Furthermore, Miller had made statements before the Grand Jury incriminating both himself and Podell. Once Podell had pleaded guilty, the Government was no longer prohibited by *Bruton v. United States*, 391 U.S. 123 (1968) from introducing those statements against Miller. Finally, like Podell, Miller specifically denied that he was pleading in response to pressure or promises. Under these circumstances, we hold that Miller's plea did not rest

"in any significant degree" on the Government's promise not to recommend a jail sentence."

Petitioner herein contends that the conclusion reached by both the District Court and the Circuit Court of Appeals is unsupported in the record and results from a serious misreading of this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971).

This Court in the *Santobello* case ruled that:

> "When a plea rests in *any* significant degree on a promise or agreement of the prosecutor, so that it can be said to be *part* of the inducement or consideration, such promise must be fulfilled." (Emphasis added)

In the case at bar, the District Judge made a finding of fact that the promise to abstain from a recommendation on sentence was made and then that agreement was breached. The Trial Court ruled that:

> "I think I have announced already my position on the letter, the government's letter of January 2, court's exhibit 1, is a recommendation that prison be imposed. Otherwise, the letter makes no sense at all to me.
>
> "The government does not recommend a specific prison term and argues this letter does not violate a representation. While that may be technically correct, I view the letter in essence as a violation of the spirit, if not the letter of the agreement." (A 180)

In denying Petitioner's motion, however, the Court concluded that the representations or promises made by the prosecutor were not a material or significant part of the plea in that the Petitioner had no other choice.

Petitioner MARTIN MILLER respectfully submits that his petition deserves separate and distinct consideration apart from that of Petitioner BERTRAM L. PODELL. It is submitted that the Circuit Court may not have had difficulty in resolving the *Santobello* issue insofar as Podell was concerned, due to the fact that testimony clearly indicated that Podell's principle reason for the entry of a guilty plea was to preserve his right to practice law. It is clear that the promise not to request a jail sentence was secondary in the Podell plea.

On the other hand, and quite to the contrary, Petitioner MILLER'S position was simply that he did not wish to go to jail. Mr. Miller's testimony was exactly to that issue and no other. (A 141) The District Court and the Circuit Court drew factual conclusions totally unsupported by the record in a strained effort to sustain the guilty plea.

It should be borne in mind that the guilty plea of Miller was entered prior to his testifying at trial and both the Trial Judge and the Appellate Court did not have the opportunity to know what his testimony would be. If, in fact, Miller had no choice, it is puzzling as to why the Government accepted the plea on one count of conspiracy while insisting on two counts from Podell. It is obvious from the record in this cause that the only reason that the Petitioner's plea was entered was to avoid the imposition of a jail sentence.

As to Petitioner MILLER, the Government further promised that they would "go to bat" for him at time of sentencing due to his cooperation before the Grand Jury. The Government did, in fact, apprise the Court of Petitioner MILLER'S cooperation in the last paragraph of its letter to the District Court. However, it was the Petitioner's position that the severity and tenor of the first portion of the Government's letter was so inconsistent as to negate the last paragraph of the Government's letter with regard to the Petitioner's cooperation.

The District Court upheld the Petitioner's position in that it made no distinction as to the effect of the Government's recommendation on Podell and Miller, in that the Court found that the letter was "a violation of the spirit if not the letter of the agreement" as to both Podell and Miller. (A 180)

Again, this court held in *Santobello*, that when a defendant enters a plea, which rests in *any* significant degree on a promise of the prosecutor so that it is *part* of the inducement to enter such plea, then the promise must be fulfilled or the defendant be allowed to plea anew. (Emphasis added)

It is, therefore, submitted that the ruling of the Circuit Court is completely inconsistent with this Court's decision in *Santobello v. New York, supra.*

The Petitioner also seeks review of the Circuit Court's ruling with regard to the trial court's compliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

This Court held in *McCarthy v. United States*, 394 U.S. 459 (1969) and in *Santobello v. New York, supra* that Rule 11 of the Federal Rules of Criminal Procedure required the Trial Court to establish on the record at the time of the plea of guilty that there is a factual basis for the defendant's plea and that it was knowingly entered with an understanding of the charge.

As the record indicates, Petitioner MILLER pleaded guilty to the charge of conspiracy to violate the Conflict of Interest Statute and to defraud the United States of America. Petitioner did not plead guilty to the substantive charge of Conflict of Interest as did his co-defendant.

It is the Petitioner's contention that it is evident from the colloquy in the District Court at the time the appellant entered his plea, that the charge of conspiracy was not understood and that it was not knowingly entered.

Upon questioning from the Bench, the Petitioner stated that although he retained Podell for his influence, *he had no knowledge that he was violating the laws of the United States at the time of the transaction.* (A 48-49) (Emphasis supplied)

However, the Circuit Court held:

> "... the District Court ascertained at the time the pleas were entered, the defendants were well-educated and could be *assumed* to be aware of what had transpired at trial. Under these circumstances, it is frivolous to argue that the pleas should be set aside because the Judge failed to outline in detail the

> necessary elements of the charge, all of which were amply established in the Trial Record." (Emphasis supplied)

While it is conceded that Podell is a lawyer, the Petitioner herein is a layman and this Court requires that Rule 11 of the Federal Rules of Criminal Procedure be strictly complied with.

> "... because a guilty plea is an admission of all the elements of a Federal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (*McCarthy, supra*)

The record is clear that the Petitioner MILLER did not understand the charge of conspiracy and that he did not knowingly enter a plea to such charge, in that the Federal crime of conspiracy requires proof of an intent, actual or implied, to violate a Federal law. *United States v. Garafola*, 471 F.2d 291 (6th Cir. 1972); *United States v. DeMarco*, 488 F.2d 828 (2d Cir. 1973).

Accordingly it is submitted that the Circuit Court's ruling is in direct conflict with this Court's ruling in *Santobello v. New York* and *McCarthy v. United States* (*supra*).

Upon the foregoing, it is respectfully submitted that certiorari should be granted the Petitioner MARTIN MILLER.

CONCLUSION

Based upon the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: July 24, 1975

Respectfully Submitted,

RICHARD B. MARX
Attorney for Petitioner
MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari was served upon the Honorable Paul J. Curran, United States Attorney, for the Southern District of New York at One San Andrews Plaza, New York, New York, on ____ day of July, 1975.

_____

Counsel for Respondent